Pages 1 - 15

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE

DEMETRIC DI-AZ, OWEN DIAZ, and LAMAR PATTERSON, Plaintiffs, VS. TESLA, INC. dba TESLA MOTORS, INC.; CITISTAFF SOLUTIONS, INC.; WEST VALLEY STAFFING GROUP; CHARTWELL STAFFING SERVICES, INC.; and DOES 1-50,inclusive, Defendants.	**No. C 17-6748 WHO** San Francisco, California Tuesday, December 17, 2020

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs Demetric Di-az and Owen Diaz:
ALEXANDER KRAKOW + GLICK LLP
1900 Avenue of the Stars, Suite 900
Los Angeles, California 9006
BY: J. BERNARD ALEXANDER, ESQ.

For Defendant nextSource, Inc.:
FISHER & PHILLIPS LLP
One Embarcadero Center, Suite 2050
San Francisco, California 94111
BY: JASON A. GELLER, ESQ.
JUAN C. ARANEDA, ESQ.

Reported By: Katherine Powell Sullivan, CSR #5812, CRR, RMR
Official Reporter - U.S. District Court

Tuesday - December 17, 2020 **9:53 a.m.**

P R O C E E D I N G S

---000---

THE CLERK: Calling civil matter 17-6748, Di-az, et al., versus Tesla, Incorporated, et al.

Counsel, please come forward and state your appearance.

MR. ARANEDA: Good morning, Your Honor. Juan Araneda on behalf of defendant nextSource.

MR. GELLER: Good morning, Your Honor. Jason Geller also on behalf of nextSource. Mr. Araneda will address the Court at this time in the argument.

THE COURT: Okay.

MR. ALEXANDER: Good morning, Your Honor. Bernard Alexander on behalf of the plaintiff, both Di-az.

THE COURT: All right. So is there anybody here from Tesla?

MR. ARANEDA: I don't see anyone, Your Honor.

MR. ALEXANDER: No, Your Honor.

THE COURT: Is there some reason why there's no one here from Tesla?

MR. ALEXANDER: I'm surprised. I have no knowledge.

MR. ARANEDA: Neither do I.

THE COURT: Okay. So it seems to me that there's a question of fact on the joint employer situation. The system that -- this employment situation just seems to be designed to

avoid accountability in employment circumstances.

I also think there's a question of fact of pervasive and severe harassment, given the plaintiffs' allegations concerning how common the N word was used, and it's as repulsive a word as exists in the English language.

The incidents from the Breza (phonetic) fight to the Martinez incident to the Martinez picture to Demetric Di-az' testimony concerning how often his supervisor was using that term, from bathroom graffiti, I think all of that raises a question of fact with respect to harassment.

And if there's pervasive harassment, then it seems to me that the punitive damages claims would remain in the case. I don't think there's a claim for adverse employment action or retaliation because Mr. Di-az failed to return to work when he said he was going to. And there was no rebuttal provided by the plaintiff to that legitimate reason to let somebody go, from Tesla's perspective. And then he's still on the rolls at Citistaff.

And I don't think that there's a Ralph Act or a Bane Act claim because there's no threat of violence coming from Citistaff, or nextSource for that matter. And Martinez was a Chartwell employee. And there is no theory of joint employment set forth that would justify some vicarious liability. So that's how I analyze things.

Mr. Araneda, I'm going to start with you.

And then, Mr. Alexander, I'll let you respond.

MR. ARANEDA: Thank you, Your Honor.

So just as a starting point, the only plaintiff who's brought claims against nextSource is Mr. Owen Diaz. Demetric Di-az has brought claims against other folks.

And just to address the first point that the Court made about the system seems to be designed to avoid liability, the employer of record for Owen Diaz was Citistaff. And they retained, controlled and, as noted in the supplemental exhibit of Vincent Adams in support of the reply papers, it's clear that Citistaff retained employer responsibilities over Owen Diaz.

Now, just to step back a little, as the Court notes, the only real claims at issue here are Section 1981 of the Ralph Act, claims against nextSource at least. Plaintiffs haven't challenged the state law claims under the Bane Act, the Whistleblower Act, the emotional distress, the intentional infliction of emotional distress, negligent hiring, or constructive discharge.

So as to the two claims that are remaining, as the Court points out, the only way or theory to find nextSource liable is under the joint employer theory. But with respect to that, the plaintiffs haven't advanced any evidence to show that nextSource should be held liable under their own tests, under the --

THE COURT: Well, so it seems to me from the evidence that Mr. Jackson was the eyes and ears of nextSource on scene. And if he is the conduit for information of what's going on, that's the basis of the joint employer, it seems to me.

So address that specifically.

MR. ARANEDA: Sure. I mean, as we cited in the *Field* case, in *Field* there is a human resources person on site who was consulting, and that wasn't sufficient in *Field* to find joint employer.

Under *Global Horizons* and the common law test, you have to look at the totality of the circumstances here. And Mr. Jackson was merely a conduit, a liaison between Tesla and the staffing company and other staffing companies to streamline that process. He wasn't there making employment decisions. And he certainly -- he wasn't there, in his own words, there to manage employees, as we cited in the papers.

And there's no evidence that plaintiffs have advanced to show that nextSource exercised sufficient control over the totality of his employment at Tesla. I mean, it's undisputed that plaintiff applied for employment and was hired by Citistaff. It's undisputed that he went through the Citistaff onboarding process and even acknowledged all their policies.

It's undisputed, and even in plaintiff's own record evidence, Exhibit B to the Organ supplemental declaration, plaintiff's deposition testimony at page 425, lines 12 through

18, shows that Citistaff placed him at Tesla.

It's undisputed that paychecks were issued by Citistaff to him. It's undisputed that Citistaff directed that plaintiff direct all problems that he had at Tesla to Citistaff. Again, this is in Exhibit B to Organ's supplemental declaration at page 129, line 17 to 25 of Di-az' deposition.

I mean, it's undisputed that when plaintiff was placed at Tesla he reported to Tomata Kawasaki (phonetic), who was a Chartwell employee who reported to other Tesla employees.

So there's no evidence that nextSource directed or had any control of his day-to-day activities or his work environment. There's no evidence that nextSource disciplined him or made any decisions to discipline him.

The only way they were trying to attempt to show joint employment is by muddling the facts through Ed Romero, who was a nextSource employee. But even those facts show that Ed Romero was hired by Tesla when he started supervising Mr. Di-az.

Again, the Organ declaration, at Exhibit 4, shows that Ed Romero was a janitorial supervisor with no supervision over Mr. -- Owens' department, which was elevator operators. And he didn't become a supervisor over that area until he became a Tesla employee in October of 2015.

And there's no -- you know, they also make the argument that nextSource promoted or -- promoted Mr. Di-az from elevator

operator lead operator, but their own evidence shows that it was Kawasaki who recommended the promotion from elevator operator to lead operator. And that's at the Organ declaration Exhibit 3, page 23, lines 13 through page 24, line 2.

And, again, there's no evidence that nextSource directed the end of his employment. Given the totality of those facts, there's no joint liability. I mean, the only way that they are attempting to show liability or at least joint employment, I'm sorry, is through muddling the facts. And if we go through their evidence, it doesn't support --

THE COURT: Mr. Araneda, here's the issue that I'm thinking about. I'm going to ask Mr. Alexander to respond in just a second.

But let's say for the moment that the plaintiffs are able to show that there was pervasive harassment of African Americans and particularly of Mr. Di-az on a racial basis, and Mr. Jackson was the conduit of information between Tesla, who was certainly exercising control, to Citistaff, who was the person that hired him, and your guy is right in the middle, and as the conduit should -- if there was pervasive harassment, he certainly should have known about that.

And then what's his liability -- what is the liability of your company under that scenario? That's what I'm interested in.

MR. ARANEDA: Well, first, you have to find joint

employment. So they have to meet the --

THE COURT: Right.

MR. ARANEDA: -- totality of the circumstances and that they --

THE COURT: If your company has the obligation to provide information on the employees' welfare at Tesla to Citistaff, and you know that Citistaff doesn't have somebody who is there who's acting as the eyes and ears, why aren't you just as responsible to make that -- and be a joint employer?

MR. ARANEDA: Well, first, you have to find joint employment under the totality of the circumstances. And what I'm saying for the first step is the totality of the circumstances don't establish joint employment in the first place.

THE COURT: So you never get to my question then?

MR. ARANEDA: Say that again.

THE COURT: So you never get to my question because there's just no joint employment in the first place?

MR. ARANEDA: Right. But even if there is joint employment, under *Global Horizons*, that doesn't automatically make nextSource liable. As the Court points out, you know, they knew or should have known about incidents, and failed to act or take corrective action within their control.

And nextSource was on site at Tesla as a liaison, as a managed service program provider to set up a platform for

exchange of payroll data and other information to streamline the contingent worker program for Tesla but also as a liaison between the staffing companies. So, I mean, its role was limited. So its role was to provide that information back and forth.

THE COURT: And if it failed to provide that information, there's still no liability because you go back to the first step of the totality of the circumstances?

MR. ARANEDA: No. Well, if you've already established joint employment, then you go to the second step. But there, there's no evidence that nextSource knew and failed to act within its control.

We see that when the Martinez confrontation occurred. It spoke to both -- Jackson spoke to both Martinez and Mr. Di-az. This is at Exhibit 127 of Jackson's deposition. And it was Tesla who decided that they would both receive verbal counseling. So there was action taken within nextSource's control.

When the picture came up, the drawing that Martinez -- the offensive drawing that Martinez drew in January 2016, Di-az reported that to Tesla and eventually forwarded his email to Jackson, who immediately forwarded that to Chartwell, Martinez' employer. And they took corrective action. They immediately investigated Martinez. So it acted within -- it acted within its purview of providing this information to the appropriate

folks. There's no evidence of this pervasive harassment, that nextSource knew of the pervasive harassment.

THE COURT: Okay.

MR. ARANEDA: And so there hasn't -- the record evidence submitted in opposition does not -- does not show that nextSource knew of any pervasive harassment.

THE COURT: Okay.

Mr. Alexander.

MR. ALEXANDER: Thank you, Your Honor.

With regard to Mr. Jackson, it isn't just that he was a conduit and he received information and was just passing it on. There was also testimony that he actually heard the N word used throughout the workplace commonly, and he was offended by it but he took no action. So he had this knowledge, and nextSource created this workplace. They were responsible for all the subcontractors that brought in employees that created the workplace.

How could nextSource have knowledge that the N word was in the workplace, have knowledge through the conduit process of all of this and not know that it had a responsibility to address the workplace or at least speak to Tesla and make sure Tesla addressed the workplace?

I don't see how we -- totality of the circumstances would consider that. I don't see how we could ignore that. So I believe the Court is correct that it is a question of fact.

If I could briefly just address the termination. It is true that Mr. Di-az did not return to work, but we don't have enough facts to know why he didn't return to work.

At the point when he didn't return to work, we do know that there was a hostile work environment that was present and we do know it had not been corrected. There had been no affirmative action to address the pervasiveness like there was when there was the drawing placed in the rest room with regard to women.

If Mr. Di-az had a workplace to return to where it had been corrected, then we'd have one thing. But under the circumstances, when he did not come back, it is completely logical and the jury could find that it was constructive discharge. He didn't come back because no one was taking affirmative corrective action to correct the workplace, and he was going to be returning to the same workplace where he was having the issues in the past.

And if you at least follow his story, he was going to be falsely accused of being unprofessional and a number of other things not because he was but because he was complaining about discrimination in the workplace constantly, which would be retaliatory discharge.

So I think that the Court has enough facts to allow us to go to a jury with regard to constructive discharge. Yes, he was terminated for not returning, but at the same time that was

in a brief two-week time frame. He still had the ability to return.

He left for leave because of a family issue. And if you combine the family issue and the daunting task of returning to work, there is enough reason for him to have not returned due to the workplace. And so I think there is a question of fact as to that issue.

THE COURT: Do you think you made that argument in the briefs?

MR. ALEXANDER: Uhm, I think we referenced that argument ambiguously. I'm going to say that. But it was not as clear as I've made it today.

THE COURT: Mr. Araneda.

MR. ARANEDA: Well, plaintiff agreed that they conceded on the wrongful termination claim.

And in terms of the daunting task coming back to work because he was being accused of wrongdoing, there's no evidence that he was being wrongly accused because of his race, which is what the 1981 claim is premised on.

There has to be discriminatory intent, and they haven't shown any discriminatory intent based on race. And the reason I say that is because the complaints from the Tesla employees that were coming were apart from these other complaints, were very different and from different parts of the factory.

I think you have Jostilla Grant (phonetic), who is a

different supervisor, who basically, in February, you know, told Ed Romero to look at the emails, that she was fed up with dealing with Mr. Di-az. And so there's no -- there's no evidence that any harassing or discriminatory conduct that occurred in the past carried over into the March time period.

There's also intervening good facts by the employer would dispel any notion of any connection between the two; particularly, he was promoted and then, after the incident with the drawing in January, he was even given a raise by Tesla.

So I don't -- you know, I don't think that there's any issue with this daunting task coming back providing a basis for claiming some sort of constructive discharge.

THE COURT: Okay. All right. I will take this under submission then and try and get an order out soon.

Since you're here, there is a motion that is set for January on the confidentiality documents. I don't know whether this was -- let me bring it out -- whether this was a Tesla or a nextSource issue. I don't know whose issue it was.

MR. ALEXANDER: I believe it's a Tesla issue, if I'm correct, Your Honor.

THE COURT: Okay.

MR. ALEXANDER: I believe that they have designated everything under the sun as confidential, and that is the issue.

THE COURT: So here's my issue: I'm going to take

that off calendar. From what the plaintiffs described, it does sound as though Tesla has been overbroad in its designation. If they're designating documents to and from the Diazes, as an example, that would seem to be overbroad.

This is a court of public record, and so when it comes time to try the case, from the descriptions it would seem that many of the documents that have been marked as confidential won't meet the compelling standard that would be required to keep them confidential.

But I'm not going to make a ruling now, and I see no point in doing that until pretrial. If I have to look at the documents at the pretrial conference and I see that they've been way overdesignated, then I will assess costs. On the other hand, if I see that they are obviously confidential, then I will assess costs.

But these are the kinds of things that lawyers ought to be able to deal with themselves. I would pass on to your codefendants that it is the rare document that gets redacted once a case goes to trial, and that includes from patent cases to, you know, any sort of a case. So they should think carefully about what they want to assert as being confidential.

Then the other thing is, if I haven't told you absolutely, I'm now telling you absolutely, the trial will be May 11th. The criminal trial, as I indicated, is just going to knock the earlier trial date out.

I don't think I had set a pretrial conference, and so I'm going to set that for April 20th, at 2:00 p.m.

And then the final thing is, you should get with Judge Illman for settlement. So let him know where things stand.

I will try to get an order out soon. I'll try and get an order out soon, but I would get -- you'll certainly have an order by the second week in January, and so you should get a settlement conference on the schedule.

MR. ARANEDA: We have one on schedule for January 16th, I believe.

THE COURT: Oh, you do? Oh, great. Okay. So we will get an order out well in advance of that so that your clients can think about it.

Good. All right.

MR. ARANEDA: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. ALEXANDER: Thank you, Your Honor.

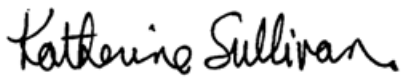
(At 10:17 a.m. the proceedings were adjourned.)

- - - - -

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, January 6, 2020



Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter